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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-280

THOMAS G. S. CHRISTENSEN, NEW YORK TYPOGRAPHICAL UNION NO. 6, ET AL., *Petitioners,*

v.

NEW YORK TIMES COMPANY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSTANTINE P. LAMBOS
JACOB SILVERMAN
21 West Street
New York, N. Y. 10006
Counsel for Petitioner Thomas G. S. Christensen

GERHARD P. VAN ARKEL
EUGENE GRESSMAN
1828 L Street N.W.
Washington, D. C. 20036
Counsel for Petitioners New York Typographical Union No. 6, Bertram A. Powers and David W. Crockett

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on May 15, 1973, by the United States Court of Appeals for the Second Circuit. The petitioners making that request are Thomas G. S. Christensen, New York Typographical Union No. 6, Bertram A. Powers and David W. Crockett.[1] The

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[1] Bertram A. Powers and David W. Crockett, petitioners herein, are Union Trustees of the Typo-Publishers Outside Tape Fund.

respondents herein are the New York Times Company, the New York Post Corporation, John Bogart and Leonard Arnold.[2]

OPINIONS BELOW

The opinion of the Second Circuit, rendered on May 15, 1973, is reported at 83 LRRM 2410. It is reprinted in the Appendix hereto, p. 1a, *infra.*

The opinion of the District Court for the Southern District of New York (Tyler, J.), rendered on June 26, 1972, is reported at 344 F.Supp. 194 and is reprinted in the Appendix hereto, p. 7a, *infra.*

JURISDICTION

The various petitioners appealed from a judgment of the Southern District, rendered on June 26, 1972, that had denied a petition for a declaratory judgment that certain payments from a jointly administered Typo-Publishers Outside Tape Fund would not violate §302 of the Labor Management Relations Act of 1947, 29 U.S.C. §186. On May 15, 1973, the Second Circuit entered its judgment and opinion affirming the Southern District's judgment. Senior Judge Wyzanski, sitting by designation, dissented from the Second Circuit's per curiam affirmance. No petition for rehearing was filed. This petition for writ of certiorari has been filed within 90 days from the entry of the Second Circuit's judgment.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[2] John Bogart and Leonard Arnold, respondents herein, are Employer Trustees of the Typo-Publishers Outside Tape Fund.

QUESTION PRESENTED

Does §302(c) (5) of the Labor Management Relations Act, permitting an employer to contribute to a jointly administered industry trust fund "for the sole and exclusive benefit of the employees of such employer," apply to or prohibit the distribution of benefits from such a fund to all employees in a common labor pool, covered by similar collective bargaining agreements, who are adversely affected by the installation of automated equipment but whose employer may not have installed such equipment and hence may not have contributed to the trust fund?

STATUTORY PROVISIONS INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. §186:

> (a) It shall be unlawful for any employer . . . to pay, . . . or agree to pay . . . any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce;
>
> * * * * *
>
> (c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): . . .

STATEMENT OF THE CASE

A. Proceedings Below

The petitioner Thomas G. S. Christensen was the sole arbitrator of a dispute as to whether a proposed plan of benefits under the Typo-Publishers Outside Tape Fund, whereby benefits would be payable to employees both of contributing employers and of non-contributing employers, was consistent with the underlying collective bargaining agreements and the trust agreement. Having found that these agreements did permit such a plan, the arbitrator proceeded, as directed by the arbitration agreement, to petition the United States District Court for the Southern District of New York for a declaratory judgment as to the legality of such a benefit plan under §302 of the Labor Management Relations Act. All other petitioners and respondents herein were parties to that declaratory judgment proceeding.

The District Court interpreted §302 so as to preclude the use of the assets of such a trust fund to benefit union members who are or were employees of non-contributing employers having collective bargaining agreements with the same union. The arbitrator's petition was accordingly denied. See Appendix hereto, pp. 7a-13a, *infra*. The Second Circuit affirmed by a divided vote, Senior Judge Wyzanski dissenting. See Appendix hereto, pp. 1a-6a, *infra*.

B. Creation of Industry-wide Automation Fund

The facts leading to the arbitration and the declaratory judgment action are not controverted. During the 1960's, various newspapers in the New York City area negotiated agreements with the petitioner New York Typographical Union No. 6 that authorized the news-

papers to use tape (called "outside tape"), received over the wires of the AP and UPI, so as to automatically set in type the voluminous stock market tables. The use of such outside tape eliminated the need to have employees in the composing room set the stock market tables by hand or by machine.

Substantial savings obviously accrued to those newspaper publishers that installed the outside tape equipment. And they agreed to pass along some of those savings to the union members in the New York City area as reimbursement for any economic injury suffered as a result of such automation. Thus, utilizing an agreed-upon formula, the users of the equipment obligated themselves to make payments to a trust fund, to be jointly administered by the union and the publishers in accordance with the requirements of the Labor Management Relations Act. The funds so accumulated were to be used generally for "retraining programs, supplemental unemployment benefits . . . and incentive retirement benefits." App. 81a-82a.

Thereafter, a jointly administered trust was established pursuant to §302(c) of the Act. Initially there were separate trusts for each contributing newspaper, but in 1967 these were merged into a single trust known as the Typo-Publishers Outside Tape Fund. Contributions were made to that trust fund by publishers using outside tape, which presently include only the New York Times and the New York Post.[3]

Article 3 of the trust instrument establishing the single Outside Tape Fund provided, *inter alia,* that

[3] Payments were made by the New York Herald Tribune and the New York World-Journal-Telegram until their demise. Their contributions are now a part of the Typo-Publishers Outside Tape Fund assets.

in the event that the union consented to the installation of automatic typesetting equipment and in the event "that employees are subject to lay-off, involuntary reassignment, reduction in pay, inability to obtain employment or other adverse consequences as a result of such installation, or in the event that . . . there is systematic and chronic unemployment in the newspaper industry," App. 36a-37a, the Trustees

> ". . . shall make distributions out of the fund to provide for and maintain a system of supplemental unemployment and involuntary reassignment benefits in order to lessen and alleviate the impact of such installation of automatic typesetting equipment or such systematic and chronic unemployment on employees adversely affected thereby." App. 37a.

But the trust instrument provided for no plan of benefits, leaving it to the Trustees to determine when necessary the "amounts, conditions and eligibility requirements of such benefits." App. 37a.

C. Disagreement on Proposed Benefit Plan.

In 1971 the Union Trustees proposed that a plan of benefits be established, a proposal that led to the arbitration and the declaratory judgment action. Under that proposal, which was opposed by the Employer Trustees, the trust assets would be used to pay benefits to beneficiaries having employee status not only with the present contributing publishers (the New York Times and the New York Post) but also the employees of any other publisher "in the newspaper industry who is a signatory to a collective bargaining agreement with New York Typographical

Union No. 6." App. 21a. In other words, benefits would be payable to employees of all newspaper publishers having contracts with the union, whether or not those publishers had ever contributed to the Typo-Publishers Outside Tape Fund.[4]

The Employer Trustees, who represented the New York Times and the New York Post, opposed this suggested plan of benefits on the grounds that, under their collective bargaining agreements, the trust agreement and §302 of the Act, the publishers' contributions to the Outside Tape Fund could be utilized only for the benefit of past or present employees of the contributing publishers. In accordance with the trust agreement, this dispute was submitted to arbitration, but only with respect to the consistency of the proposal with the collective bargaining agreements and the trust agreement. The arbitrator, the petitioner Thomas G. S. Christensen, ruled that both the collective bargaining agreements and the trust agreement authorized a plan of benefits covering past and present employees of contributing and non-contributing employers.

D. Findings of a Common Pool of Employees

In accordance with the arbitration agreement, the arbitrator then petitioned the District Court below, on behalf of all parties, for a declaration that the proposed plan was also legal in light of §302 of the Act. App. 5a-12a. Attached to the petition was an affidavit by the arbitrator giving the history of the dispute and

[4] The other major newspaper publishers having collective bargaining agreements with Typographical Union No. 6 are the New York News, Inc., and the Long Island Daily Press Publishing Co., Inc. Neither of those newspapers has utilized outside tape. Hence, neither has made contributions to the Outside Tape Fund.

a summary of the arbitration award. App. 13a-19a. Included in that affidavit was a paragraph (No. 14) that epitomized the arbitrator's determination in his award that the New York City newspaper employees constituted a single work force, making it appropriate to extend benefits to all such employees regardless of the contributing or non-contributing nature of their particular employer.[5] That paragraph read:

> "14. I concluded that in making my determination the collective bargaining history in the industry, not only for the 1970 Agreements but commencing from 1963 when the question of the use of tape became important was relevant.

---

[5] In concluding that the collective bargaining agreements authorized the payment of benefits to employees whose employers do not and have not contributed to the Outside Tape Fund, the arbitrator stated as follows in his award (App. 62a-63a):

"I reach that conclusion on the following basis. First, while the structure and machinery of collective bargaining between the Union and publishers in the New York City metropolitan area has varied widely in the last decade, it subsumes the concept of one industry, albeit with employer participants with sometimes differing problems and interest and contractual agreements. Whether the contracts between the Union and the publishers in that area have been "industry-wide" or individual, they evidence far more of a concept of a single work force, recognized by uniform contractual terms and conditions of employment, than separate, individual employer pools of labor. It is patent that the skilled employees represented by the Union constitute in its mind, in the minds of its members and in the posture of the publishers a homogenous group desirous of and frequently receiving common protections, benefits and conditions of employment despite individual publishers at various times."

Similarly, the award found that "The Outside Tape Fund was created and has been continued as an entity despite the changing character of the underlying negotiations and collective agreements. Its history, in sum, is one reflecting industry conditions rather than being specifically and explicitly related to any one or several publishers under separate contractual accords." App. 70a.

> Also relevant was the fact that by long tradition and under the terms of the collective bargaining agreements negotiated by the Union and the New York Newspaper Industry, there is considerable interchange between the newspapers by composing room employees represented by the Union. An employee terminated by one such employer has, under this tradition and these agreements, the absolute right to seek work at any other newspaper and when work is available to fill such positions on a priority basis ahead of all subsequent applicants for work." App. 16a.

No challenge was made to the affidavit filed in the court by the president of Typographical Union No. 6, an affidavit that confirmed the arbitrator's determination that the unemployment and other ill effects resulting from automation is not confined to the employees of contributing publishers but radiates out to all newspaper publishers' employees in the New York City area. App. 93a-97a. As summarized in the opinion of the District Court below (see Appendix hereto, pp. 11a-12a, *infra*), in this affidavit:

> "Mr. Powers has stated therein that all typographical workers are divided into two employment categories according to their seniority. Those workers enjoying the greatest seniority are termed 'situation holders.' Situation holders are employed by newspaper publishers on a permanent full-time basis. Typesetters with less seniority are 'substitutes.' In order to obtain employment, substitutes place their names on a 'slip board' at the newspapers at which they de-

sire employment. As positions become available due to illness of situation holders or to expanded newspaper editions, substitutes are called in to work at the paper at which they have 'slipped up.' Upon retirement of a situation holder, the most senior substitute on the slip board at that time is offered a permanent situation."

And one of the significant paragraphs in the affidavit itself stated:

> "In a real sense, the printers on the New York newspapers constitute a single pool of labor, for example, if all available substitutes at the New York Times have been hired, and additional help is needed, the chapel chairman (union steward) will call other newspapers to learn if there are available substitutes who have not been hired; if there are, they will be asked to fill in at the Times. Similarly, when in 1971 Fairchild Publications announced that it would go out of business, New York Typographical Union, to insure an orderly transition, permitted those who would become unemployed to establish priority at any other New York newspaper even while continuing to work at Fairchild." App. 97a.

E. The Philadelphia Waterfront—Another Common Pool.

This description of the nature of employment in the New York City newspaper industry assumed critical importance in the comparison drawn by the District Court and the Second Circuit with the employment situation on the Philadelphia waterfront, a situation that was the subject of the Third Circuit's allegedly

conflicting decision in *Bey* v. *Muldoon*, 354 F.2d 1005 (3rd Cir. 1966).[6]

In *Bey*, a trust fund had been established for the purpose of compensating longshoremen who had lost work as a result of automation, and it was held that such benefits could be paid to all affected longshoremen on the Philadelphia waterfront, even those whose employers had never contributed to the fund. Out of the 15 to 18 stevedoring companies on that waterfront, only one (Jarka Corp.) had installed automated sugar unloading equipment and Jarka alone had contributed to the trust fund. As a result of Jarka's actions in this respect, "the number of men regularly employed [by Jarka] was reduced from 133 to less than 60." 223 F. Supp. at 490.

The court found that Jarka's installation of automated equipment could also affect employment opportunities with the other stevedoring companies, there being a "ripple effect" from an automated displacement of a Jarka longshoreman. And because the mobility of longshoremen in shifting their employment from one stevedoring company to another was so great and so repeated, the court rather graphically described the "realities" of stevedoring-longshoring in these terms: "a longshoreman is the employee of the waterfront and the waterfront is his employer." 223 F. Supp. at 494.

Such were the circumstances that led to the *Bey* ruling that §302 (c) (5) does not proscribe the effort to compensate the victims of automation through a

[6] The Third Circuit there affirmed, per curiam, the lower court's more elaborate opinion. *Bey* v. *Muldoon*, 223 F.Supp. 489 (E.D. Pa. 1963). This Court denied certiorari in the case. 384 U.S. 987 (1966).

trust fund to which the victims' employers may not have contributed. None of the evils that prompted Congress to enact §302 (c) (5) were found to inhere in those circumstances, and the *Bey* court concluded that in this context it was fair to consider the 15 to 18 stevedores collectively as the "employer" in applying §302 (c) (5).

The District Court below concluded, after its review of the employment situation in the New York City newspaper industry, that the situation "is hardly that of a typical waterfront 'shape-up'." The hiring of printing "substitutes" was held not to approximate "a waterfront shape-up for, under the rules of the union, substitutes can register or 'slip-up' at only one newspaper at a time" and, further, "a substitute's 'priority' for a permanent situation is determined, in part at least, by the length of his registration at a given newspaper." See p. 12a, *infra*. The court thus concluded "that substitutes are hardly the 'peripatetic workers' found in *Bey* on the Philadelphia waterfront" and that the petitioners had failed to establish "that typesetters work for every publisher and that publishers as a group should be considered as the employer in applying §302 (c) (5)." See p. 13a, *infra*. And since the proposed plan would confer benefits on typesetters whose employers may never have contributed to the Outside Tape Fund, implementation of such a plan was said to violate §302 (c) (5).

The Second Circuit agreed as to the inapplicability of the *Bey* decision, stating that

> "It suffices to point out that the result in *Bey* rested on the peculiar nature of the use of longshoremen on the Philadelphia waterfront; the

longshoremen worked for the 'waterfront' rather than for any particular stevedoring company. It is apparent from the record developed here that, unlike the Philadelphia longshoremen, the vast majority of typographical workers at the *Times* and the *Post* are employees of one newspaper employer. Thus *Bey* is not persuasive authority for the contention of appellants." See pp. 4a-5a, *infra*.

REASONS FOR GRANTING THE WRIT

1. The decision below reflects a conflict between the Second and Third Circuits as to the application and interpretation of § 302(c)(5).

The Second Circuit's resolution of the central issue in this case directly conflicts with the Third Circuit's per curiam approval (354 F.2d 1005) of the District Court's ruling (223 F.Supp. 489) in *Bey* v. *Muldoon*. And it is in light of that treatment of the issue by the Third Circuit that this Court denied certiorari in *Bey*.[7] 384 U.S. 987.

The issue that has divided these Circuits is an important one in an age of constantly advancing technology and automation. Does §302 (c) (5) of the Labor Management Relations Act outlaw the joint efforts of management and labor to provide financial

[7] The sole question presented in the petition for certiorari filed in this Court in *Bey* v. *Muldoon*, No. 1254, Oct. Term 1965, reads as follows:

"Where only one of many stevedore employers makes financial contributions to a fund created pursuant to the resolution of a labor dispute involving job reduction due to automation, does § 302(c)(5) of the Labor Management Relations Act permit an entire union membership to participate as beneficiaries of such fund without regard as to whether individual union members were ever employed by the contributing employer?

assistance to the victims of automation within a common labor pool where those victims chanced never to have worked for an employer whose automated equipment obligated him to contribute to the trust fund?

The Second Circuit has given an affirmative answer to that question. It has looked solely to the literal language of §302 (c) (5). It has ignored the legislative purposes underlying that language. And it has concluded that to permit benefits to be distributed to such a victim of automation would violate the statutory command that such a trust fund must be "for the sole and exclusive benefit of the employees of such [contributing] employer."

Contrariwise, the Third Circuit, by its approval of Judge Lord's lower court opinion, has eschewed a blindly literal approach to §302 (c) (5). It has looked to the legislative intent respecting that language and found that the restriction of benefits to "employees of such employer" was inserted in the Act solely to insure that "an employee whose hour's work required the employer to make a payment of five cents to the trust fund be assured of reaping the benefit of that payment." 223 F.Supp. at 495. Thus the employer contribution to the trust fund was conceived of by Congress as the equivalent of a part of, or as a deduction from, the wage that his employee had actually earned. And by insisting that the benefits be available only to such an employee of the contributing employer, Congress was seeking to preclude the employee's union from using the trust funds for "non-union or even general union purposes . . . [or] for the benefit of all the employees represented by the union without regard to which of the union members had earned the right to this [benefit] payment." *Ibid.*

But the employer contribution in *Bey*, as in the instant case, was not being made as a substitute for a wage for work actually performed by any employee. Rather, it was a contribution for the benefit of all workmen whose labor had been rendered unnecessary by virtue of the installation of automated equipment. And those whose work was thus rendered unnecessary were found in *Bey* not to be limited to the contributor's own employees; the impact of the automation instituted by the one employer radiated to all longshoremen on the Philadelphia waterfront. So, too, in the instant case the outside tape technique utilized by the New York Times and the New York Post had repercussions on the job opportunities of all within the common pool of typesetters in the New York City area.

The essence of the *Bey* ruling is that such a contribution, based on the amount of labor displaced by automation, is not within the purview of Congress' concern in §302 (c) (5) and that benefits can thus be paid to affected workers other than those employed by the instigator of automation. That ruling cannot be squared with the Second Circuit's decision in the instant case.

2. The decision below raises important questions of statutory construction in the context of the recurring problems of automation.

The action of the Second Circuit in reading §302 (c) (5) in its most literal sense, disregarding the legislative history and the evils that Congress sought to outlaw, raises a significant problem in statutory construction. In reading § 302 in its criminal context, this Court has warned against reading the terms thereof, such as the word "representative," in a narrow fashion that

"would substantially defeat the congressional purpose." *United States* v. *Ryan,* 350 U.S. 299, 304 (1956). And the Court has further indicated that a literal construction of the criminal aspects of § 302 may be permissible where "[a]n examination of the legislative history confirms that a literal construction of this statute does no violence to common sense." *Arroyo* v. *United States,* 359 U.S. 419, 424 (1959).

The basic question remains open whether and under what circumstances § 302(c)(5), in its civil context, should be read literally. Should that section in all situations be read literally to preclude "the extension of benefits to persons who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions"? *Blassie* v. *Kroger Company,* 345 F.2d 58, 71 (8th Cir. 1965). See also *Moglia* v. *Geoghegan,* 403 F.2d 110, 116 (2nd Cir. 1968). Or should the section be read liberally in the light of the precise congressional intent and the limited evils to be proscribed?[8] Is it consistent with the accepted principles of statutory construction to read out of §302 (c) (5) any prohibition of benefits to the victims of automation who have not been employed by the contributing employer?

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[8] In the words of Senior Judge Wyzanski's dissenting opinion below, "a careful reading of the primary and other sources by counsel and the court has not uncovered any expressions of opinion, hostile or otherwise, by Senators, Congressmen, witnesses, or others with respect to the type of plan here involved. We have no ground to suppose that, in general, Congress has been unsympathetic with pooling of employees' unemployment, pension, and like funds which treat all employees in an industry, or section thereof, as having such a common interest that they become, by their own free choice, mutual self-insurers." See p. 5a, of Appendix hereto.

The Third Circuit proceedings in *Bey* led to the use of the word "employer" as the vehicle for a liberal interpretation of § 302(c)(5) to permit benefits to be accorded the victims of automation not employed by the contributing employer. In the phrase "for the sole and exclusive benefit of the employees of such [contributing] employer," the word "employer" was construed to include the multiple employers that were said to constitute the Philadelphia "waterfront." Only one of those employers had contributed to the trust fund and it was the "employer" of about 60 permanent employees. But because of the extreme mobility of other longshoremen in moving almost daily from one employer to another it was decreed that the "waterfront"—composed of the 15 to 18 stevedoring "employers"—could be encompassed within the § 302 (c) (5) concept of a contributing "employer." All members of the common longshoremen pool were conceived to be employees of the "waterfront," only one segment of which had actually contributed to the trust fund.

In the instant proceedings, the courts below sought to distinguish the *Bey* case solely because the New York City typesetters lack the intensity of the Philadelphia longshoremen's mobility in shifting from one employer to another. It is true, of course, that typesetters do not engage in so rapid a job-change. But the difference is a matter of degree. Like the longshoremen in *Bey,* the New York City typesetters constitute a common labor pool from which the newspaper employers draw their employees; and there is a discernible amount of employment and priority changes from one newspaper to another.

But in the context of so reading the language of § 302 (c)(5) to conform to the limited objectives of Congress, should the result depend solely upon the degree of employment mobility? If Congress truly intended not to prohibit benefits to victims of automation within a common labor pool, why should the term "employer" be construed to include the group of employers drawing on that pool only if the pool is so fluid that employees constantly change jobs? Should it not be enough that there is a common pool for multiple employers to draw from, and that there is a degree and certainly a potential of employment mobility? The differences that obviously do exist between the Philadelphia "waterfront" and the New York City newspaper industry are of more significance than merely distinguishing the factual situation in the *Bey* case. They are differences that in themselves deserve consideration by this Court in evaluating the statutory interpretation problem at hand.

Moreover, the *Bey* solution to the statutory problem may not be the only possible one, given the propriety of the conclusion that Congress did not mean to outlaw benefits to automation victims in a common labor pool. It might be possible to interpret the word "employee," rather than "employer," to meet this situation. As this Court observed in *Labor Board* v. *Hearst Publications,* 322 U.S. 111, 124 (1944), in many situations the term "employee," like that of "employer," is not a word of art but rather "takes color from its surroundings . . . [in] the statute in which it appears" and "derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.'" The term "employee," in other words, should be "determined

broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *Ibid.*, at 129.

In other statutory contexts, the term "employee" has been construed to include applicants for work. *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177 (1941). Indeed, in construing the word "employee" in § 302(c)(5), Mr. Justice (then Judge) Blackmun on behalf of the Eighth Circuit has ruled that the "reasons for the statute, and its purposes" justify reaching beyond an "employee" currently employed, as the word literally means, to encompass retired or inactive employees, since "[b]enefits after retirement are not an evil at which the statute was directed." *Blassie* v. *Kroger Company,* 345 F.2d 58, 69 (8th Cir. 1969).[9]

Thus it would be possible to construe the term "employee" in § 302 (c) (5) to include potential employees that a contributing employer might draw from a common and mobile labor market, since benefits to such potential employees who suffer from the ravages of automation instituted by a contributing employer "are not an evil to which the statute was directed." Whether such a construction is a legitimate one, of course, is a part of the question presented to this Court in this petition.

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[9] In *Crawford* v. *Cianciulli*, 83 LRRM 2228, 2236 (E.D.Pa., 1973), it was held that one can be the beneficiary of a § 302(c)(5) trust "so long as he was, during any period of time otherwise covered by the trust agreement, an employee of a currently contributing employer." Under that interpretation, he may receive benefits even though his last employment was by a currently non-contributing employer.

Ultimately, whatever the vehicle for liberally construing § 302(c)(5), the question here raised is that put by Senior Judge Wyzanski in his dissent below (p. 6a of Appendix hereto):

> "Thus the question is whether to disregard the letter of the statute, and to hold it inapplicable because the challenged conduct is not within the reason of the statute. This raises a familiar issue. Theoretically little can be added to the classic authorities on the subject. *United States* v. *Carbone,* 327 U.S. 633; see *Holy Trinity Church* v. *United States,* 143 U.S. 457. *Lynch* v. *Overholser,* 369 U.S. 705, 710.
>
> "In my view those authorities point to the desirability in this case of disregarding the letter of the prohibition and allowing the parties to carry out their agreement to which, so far as we are informed, there is no objection founded on declared or undeclared, discoverable or undiscoverable, alleged or implied, public policy."

It need only be added that the problem of construing § 302 (c) (5) in light of joint efforts to ameliorate the ill effects of automation is an important and recurring one in the national economy. See Report on Automation by the President's Advisory Committee on Labor Management Policy (G.P.O., Jan. 11, 1962). One of the major efforts to meet the impact of job displacement by automation has been the creation of joint trust funds, providing financial assistance to the displaced worker until he can find other employment. Many such funds are to be found in the longshoring, the construction and the printing industry, all of which

are marked by multiple employer-contributors and large common labor pools.[10]

This Court's consideration of the meaning of § 302 (c)(5) in this context of automation, with particular reference to the terms "employer" and "employee" and the benefits that can be paid, will have a marked effect on the development and stability of these funds. A definitive resolution of these statutory problems is needed in order to assist in the amelioration of the hardship visited on labor by increased automation.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

CONSTANTINE P. LAMBOS
JACOB SILVERMAN
21 West Street
New York, N. Y. 10006
Counsel for Petitioner Thomas G. S. Christensen

GERHARD P. VAN ARKEL
EUGENE GRESSMAN
1828 L Street N.W.
Washington, D. C. 20036

Counsel for Petitioners New York Typographical Union No. 6, Bertram A. Powers and David W. Crockett

[10] This Court has noted that such multiple employers frequently engage in joint bargaining "in industries like longshoring and building construction, where workers change employers from day to day or week to week." *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 94 (1957).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 514, 515—September Term, 1972

(Argued: March 6, 1973 Decided: May 15, 1973)

Docket Nos. 72-2118, 72-2183

In the Matter of the Arbitration
of the
TYPO-PUBLISHERS OUTSIDE TAPE FUND

THOMAS G. S. CHRISTENSEN, *Petitioner-Appellant,*
NEW YORK TYPOGRAPHICAL UNION No. 6 and
BERTRAM A. POWERS and DAVID W. CROCKETT,
Union, Union-Trustees-Appellants,

v.

NEW YORK TIMES COMPANY and JOHN BOGART,
NEW YORK POST CORPORATION and LEONARD ARNOLD,
Employers, Employers-Trustees-Appellees.

Before: LUMBARD and TIMBERS, *Circuit Judges,* and WYZANSKI, *District Judge.**

Appeals from a judgment of the Southern District of New York, Harold R. Tyler, Jr., *J.*, denying arbitrator's petition for a declaratory judgment that payments from a

* Of the District of Massachusetts, sitting by designation.

joint employer-union trust fund did not violate section 302 of the Labor Management Relations Act of 1947, 11 U.S.C. § 186.

Affirmed.

PER CURIAM:

These are consolidated appeals from a judgment of the Southern District, 344 F. Supp. 194 (1972), denying arbitrator Thomas G. S. Christensen's petition for a declaratory judgment that certain payments from the jointly administered "Typo-Publishers Outside Tape Fund" (the "Fund") did not violate section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186. In 1970 the trustees representing the New York Typographical Union Local No. 6 (the "Union") proposed the payment of benefits from the Fund to employees of any employer having a collective bargaining contract with the Union, irrespective of whether the employer had made contributions to the outside tape fund. The trustees representing the *New York Times* and the *New York Post* opposed this plan, arguing that under the collective bargaining agreements, the trust agreement, and section 302 of the Labor Management Relations Act only former or present employees of the *Times* and the *Post* could receive benefits from the Fund.

Under the terms of the trust agreement the dispute was submitted to arbitration before Thomas G. S. Christensen, who determined that the collective bargaining agreements and the trust agreement authorized payments from the Fund to employees of non-contributing employers. The arbitrator, pursuant to the submission, then petitioned the district court for a ruling as to the legality of such payments under section 302(c)(5). From the district court's denial of the petition the arbitrator and the Union, together with Bertram Powers and David Crockett, the two Union-trustees, have appealed.

The factual background of the dispute is fully set out in the opinion below and need not be repeated here. The only question on appeal is the narrow one of whether the district court erred in its determination that section 302(c)(5) of the Labor Management Relations Act of 1947 prohibits the payment of benefits from the Fund to employees of non-contributing employers. We agree with the district court that section 302 does prohibit such payments.

Section 302(a), 29 U.S.C. § 186(a) makes it "unlawful for any employer . . . to pay, . . . or agree to pay, . . . any money or other thing of value—

> (1) to any representative of any of his employees who are employed in an industry affecting commerce; . . . "

Section 302(c)(5) excepts from the prohibition of section 302(a) payments by employers to trust funds established for certain specified purposes if the trust is "for the sole and exclusive benefit of the employees of such employer . . . " Appellee newspaper publishers and employer-trustees contend that the clear import of this language is that only employees whose employers contribute to a qualified section 302(c)(5) trust can lawfully receive benefits from the trust.

Appellants, citing *Bey* v. *Muldoon*, 223 F. Supp. 489 (E.D. Pa. 1963), *aff'd*, 354 F. 2d 1005 (3 Cir.), *cert. denied*, 384 U.S. 987 (1966), argue that "any employee in the newspaper industry whose employer is a signatory to a collective bargaining agreement with the Union is an employee within the meaning of section 302(c)(5), and eligible to receive benefits under the [plan]."[1] They assert that the purpose of section 302 was not to eliminate the type of payments at issue here, but to prevent employers from tampering with the loyalties of union officials and to assure that the money deducted from an employee's wages for

[1] Brief of appellant Christensen at page 16.

payment to a union trust fund would not become unrestricted property of the Union, but would be used to benefit the employees whose labor was responsible for the employer contributions. See, e.g., *Bey* v. *Muldoon,* supra; I Legislative History of Labor Management Relations Act of 1947, 458; II Legislative History of Labor Management Relations Act of 1947, 1311, 1498. But see *Copra* v. *Suro,* 236 F. 2d 107, 115 (1 Cir. 1956).

While it may be that Congress in enacting section 302 did not intend to prohibit the type of trust fund at issue here, this court is bound, nonetheless, by the express statutory language that only payments by an employer to a "trust fund . . . for the sole and exclusive benefit of the employees of such employer . . ." are exempt from the general prohibitions of section 302. Where several employers have agreed in negotiations with a union to set up a section 302 trust for the benefit of union members, it is clear beyond cavil that "[o]nly employees and former employees of employers who are lawfully contributing to [the] union . . . trust fund may qualify as beneficiaries." *Moglia* v. *Geoghegan,* 403 F.2d 110, 116 (2 Cir. 1968), cert. denied 394 U.S. 919 (1969). Accord, *Rittenberry* v. *Lewis,* 238 F. Supp. 506 (E.D.Tenn. 1965); *Bolgar* v. *Lewis,* 238 F. Supp. 505 (W.D. Pa. 1960).

Appellants nevertheless urge that the term "employer" in section 302(c)(5) should be taken to refer to all those newspaper publishers having collective bargaining contracts with the Union. Their argument is based in large measure on the decision of Judge Lord in *Bey* v. *Muldoon,* supra. Judge Tyler dealt fully with this contention and no purpose would be served in repeating the district court's analysis here. It suffices to point out that the result in *Bey* rested on the peculiar nature of the use of longshoremen on the Philadelphia waterfront; the longshoremen worked for the "waterfront" rather than for any particular stevedoring company. It is apparent from the record developed

here that, unlike the Philadelphia longshoremen, the vast majority of typographical workers at the *Times* and the *Post* are employees of one newspaper employer. Thus *Bey* is not persuasive authority for the contention of appellants.

Affirmed.

WYZANSKI, *Senior Judge,* dissenting:

The majority opinion and the opinion of District Judge Tyler have a strong basis for their conclusions. Literally, the statute is plainly, unambiguously opposed to the trust fund at issue.

But it is equally clear that the Congressional purpose was solely to prevent an employer from paying funds into a union welfare fund, or the like. The Congressional reports and the Congressional Record are replete with references to abuses, or at least plans, involving payments to funds which union leaders could manage for a variety of different purposes and not necessarily for the immediate and exclusive use of those with whom employees chose to be in a common fund of mutual support. See, for example, S.Rep. No. 105, on S. 1126, 80 Cong., 1st Sess. (1947); H.R.Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess. (1947); House Conf. Rep. No. 510 on H.R. 3020 (1947); 93 Cong. Rec. 4157, 4679-4680, 4746-4747, 4875-4884, 5494-5496, 7501 (1947).

However, a careful reading of the primary and other sources by counsel and the court has not uncovered any expressions of opinion, hostile or otherwise, by Senators, Congressmen, witnesses, or others with respect to the type of plan here involved. We have no ground to suppose that, in general, Congress has been unsympathetic with pooling of employees' unemployment, pension, and like funds which treat all employees in an industry, or section thereof, as having such a common interest that they become, by their own free choice, mutual self-insurers.

Moreover, such a mutual support system has particular relevance to an industry, or section thereof, where the pattern of collective bargaining is as wide as the industry or a geographical or other broadly drawn section and where there is, if not identity of interest, at least a strong common bond against a common danger which may manifest itself almost haphazardly against some but not against others, and without any predictability.

Nor is it easy to discern what could be a public objection to allowing employers and employees who on a wholly voluntary basis, as in the case at bar, wished to enter into such a bargain, from executing their purpose. No one is the loser if all want to pool risks under such a self-insurance scheme.

Thus the question is whether to disregard the letter of the statute, and to hold it inapplicable because the challenged conduct is not within the reason of the statute. This raises a familiar issue. Theoretically little can be added to the classic authorities on the subject. *United States* v. *Carbone,* 327 U.S. 633; see *Holy Trinity Church* v. *United States,* 143 U.S. 457. *Lynch* v. *Overholser,* 369 U.S. 705, 710.

In my view those authorities point to the desirability in this case of disregarding the letter of the prohibition and allowing the parties to carry out their agreement to which, so far as we are informed, there is no objection founded on declared or undeclared, discoverable or undiscoverable, alleged or implied, public policy.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Caption omitted]

Opinion

TYLER, D.J.

This litigation arises from a proposal of the union trustees of the Typo-Publishers Outside Tape Fund (the "Fund") to utilize Fund assets to the benefit of union members not employed by publishers contributing to the Fund. The trustees representing the contributing publisher employers opposed this proposal, and, pursuant to the trust agreement, the issue was submitted to arbitration. The arbitrator found that under the collective bargaining and trust agreements, Fund assets could be used to provide benefits to union members employed by publishers who had never contributed to the Fund. The arbitrator now petitions the court for a declaratory judgment, pursuant to 28 U.S.C. § 2201, that payments made by the Fund to employees of non-contributing employers pursuant to his award of August 4, 1971 are not in violation of § 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (hereinafter referred to as "§ 302"). Petitioner also moves for an order confirming his award and directing the Fund trustees to implement its provisions.

The question of validity under federal law of an arbitration award requiring a labor trust fund to make specified payments to union members is a controversy which can be adjudicated pursuant to the provisions of the Declartory Judgment Act, 28 U.S.C. § 2201. *International Longshoremen's Association* v. *Seatrain Lines, Inc.*, 326 F. 2d 916 (2d Cir., 1964). As it also appears that an arbitrator has standing to seek a judgment confirming the validity of his award in light of § 302, *In Re Trustees of Operating Engineers, etc.*, 303 F. Supp. 1126 (N.D. Cal.,

1969), this court assumes subject matter jurisdiction of this case.

The controversy that precipitated this litigation began in 1963. At that time the New York Publishers' Association, as the representative of the publishers of daily newspapers in the New York metropolitan area,[1] informed New York Typographical Union No. 6 (the "union") that certain publishers wanted to use outside tape in their composing rooms. It was apparent to the union that the use of tape set outside of the publishers' plant to set stock-market quotations in daily newspapers would reduce the number of shifts to be worked by its members.

As a result of these apprehensions, the union entered into negotiations with the Publishers Association. In these negotiations, it was agreed that a portion of the labor expenses saved by the publishers through the use of outside tape should enure to the union members whose employment possibilities would be impaired by its introduction Accordingly, subsequent collective bargaining agreements have provided that any employer who uses outside tape must establish and make payments to an outside tape fund to be jointly administered by it and the union.

Prior to 1967, four separate outside tape funds were established between the union and publishers who chose to utilize outside tape. In 1967, after the demise of two of the four contributing publishers, the four separate funds were consolidated into a "single city-wide Typo-Publishers Fund" to be jointly administered by the union and the contributing publishers. Since 1967, only two metropolitan publishers, the *New York Times* and the *New York Post*, have utilized tape and made contributions to the consolidated fund.

In 1970, three years after the creation of the consolidated fund, a dispute arose between the union trustees and the

[1] With the exception of The New York Post Corporation.

trustees representing the contributing employers. The union trustees, contending that all typographical workers were affected by the use of outside tape at the *New York Times* and the *New York Post*, proposed utilization of trust funds created by contributions from those publishers to provide certain benefits to all union members whether or not employed by the *Times* or the *Post*. The trustees representing those two papers opposed this proposal on the grounds that under their collective bargaining agreements, the trust agreement, and § 302, their contributions to the Fund could be utilized only for the benefit of past or present employees of their companies. In accordance with the provisions of the trust agreement, this dispute was submitted to arbitration. By the terms of the submission, the arbitrator was empowered to decide whether the collective bargaining agreements and the trust agreement would permit Fund assets to be so utilized. Decision upon the issue of the legality of the union proposal vis a vis § 302 was expressly reserved for decision by this court. The arbitrator found for the union trustees on the first two questions and now presents the latter issue for judicial approval.

Section 302(a) of the Labor Management Relations Act prohibits payment by an employer of ". . . any money or other thing of value" to a labor union representing its employees. Sections 302(c)(5) and (6) provide that the § 302(a) proscription will not apply to payments made by an employer ". . . to a trust fund established by [a union] for the sole and exclusive benefit of the employees of such employer." 29 U.S.C. § 186(c)(5).[2] The courts have consistently interpreted § 302(c)(5) as meaning that "[o]nly

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[2] The § 302(c)(6) exception does not recite the phrase quoted above or, indeed, any of the limitations found in § 302(c)(5). Section 302(c)(6), however, was intended only to expand the scope of valid trust purposes and the limitations contained in § 302(c)(5) are deemed incorporated into § 302(c)(6). *Blassie* v. *Kroger Co.*, 345 F.2d 58, 74 (8th Cir., 1965).

employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust." *Moglia* v. *Geoghegan*, 403 F.2d 110, 116 (2d Cir., 1968). This interpretation, when applied to union trust funds established by an industry-wide union and a multiple employer group to which all employers do not contribute, precludes such funds from using their assets to benefit union members who are employees of non-contributing employers. *Rittenberry* v. *Lewis*, 238 F. Supp. 506 (E.D. Tenn., 1965); *Bolgar* v. *Lewis*, 238 F. Supp. 595 (W.D. Pa., 1960). Inasmuch as the award in this case seeks, in a similar situation, to use trust funds to benefit employees who are not and never have been employees of contributing employers, implementation of the award would violate § 302(a).

The proponents of the award, the union and the arbitrator, do not seriously quarrel with this principle of law, but argue that if the court took an expansive view of the term ". . . employees of such employer", see *Blassie* v. *Kroger Co.*, 345 F.2d 58 (8th Cir., 1965), the benefits conferred by the award to the entire union membership would come under the § 302(c)(5) exception. In making this argument, the proponents rely principally upon *Bey* v. *Muldoon*, 223 F. Supp. 489 (E.D. Pa., 1963), aff'd 354 F.2d 1005 (3d Cir.), cert. denied 384 U.S. 987 (1966), which held that, under the circumstances of that case, funds contributed by a single employer to a union trust fund pursuant to a multi-employer collective bargaining agreement could be used for the benefit of union employees who were not and never had been employees of the contributing employer. In arriving at this decision the court relied heavily upon ". . . the peculiar demands of the stevedoring industry" on the Philadelphia waterfront. Id. at 496. The "peculiar demands" of that industry were found primarily in the waterfront hiring practices, i.e. where "[a] longshoreman goes every day to a 'shape-up'. If there is work, he works; if there is not, he doesn't . . . [A] long-

shoreman may work for one [employer] on Monday, another on Tuesday, and a third on Wednesday." Id. at 492. The "peripatetic" nature of employment on the Philadelphia waterfront led the court to conclude that "a longshoreman is the employee of the waterfront and the waterfront is his employer." Id. at 494. This critical finding supported the court's holding "that longshoreman work for every stevedore, and that the stevedores as a group should be considered as the 'employer' in applying § 302(c)(5)." Id. at 494-495.

Despite the fact that this liberal construction of the § 302(c)(5) exception has not been expanded beyond the confines of the Philadelphia waterfront, the proponents of the award *sub judice* urge its applicability to typographical workers in the New York newspaper publishing industry. In support of this position, it is their contention that because of similarities between employment practices as they relate to typographical workers and those encountered on the Philadelphia waterfront, the reasoning of the *Bey* court is controlling here.

Although it should have been apparent that the validity of the award would rest upon a factual finding of similarity between employment practices in these disparate industries, counsel have devoted remarkably little attention to developing evidence on this point before the arbitrator or this court. Thus, the record may well be incomplete in this regard. Nonetheless, it does contain enough evidence to support a tentative conclusion that there are sufficient dissimilarities between the employment practices in newspaper publishing and the stevedoring industry to render *Bey* v. *Muldoon, supra,* inapposite to this case. Such evidence is contained in an affidavit verified by Bertram Powers, president of the union. Mr. Powers has stated therein that all typographical workers are divided into two employment categories according to their seniority. Those workers enjoying the greatest seniority are termed

"situation holders". Situation holders are employed by newspaper publishers on a permanent full-time basis. Typesetters with less seniority are "substitutes". In order to obtain employment, substitutes place their names on a "slip board" at the newspapers at which they desire employment. As positions become available due to illness of situation holders or to expanded newspaper editions, substitutes are called in to work at the paper at which they have "slipped up". Upon retirement of a situation holder, the most senior substitute on the slip board at the time is offered a permanent situation.

Although at first blush these procedures might appear to correspond to a waterfront "shape-up", several features of the system suggest otherwise. First, the great majority of typographical workers are permanent situation holders. For example, at the New York Post, 87% of the composing room employees are situation holders, and only 13% are substitutes or workers not employed on a full-time basis. It should also be noted that the publishers are required, by sections 28 and 29 of their respective collective bargaining agreements, to reduce the use of substitutes to a minimum and to create permanent situations to meet normal employment requirements. The picture thus presented by actual practice as well as by the collective bargaining agreements is hardly that of a typical waterfront "shape-up".

Nor can it be maintained that the hiring of "substitutes" approximates a waterfront shape-up for, under the rules of the union, substitutes can register or "slip-up" at only one newspaper at a time. It further appears that a substitute's "priority" for a permanent situation is determined, in part at least, by the length of his registration at a given newspaper. Thus, the requirement that substitutes offer their services to one employer at a time, coupled with the benefits to be derived from continuing registration with a single employer, lead me to conclude that substitutes

are hardly the "peripatetic workers" found in *Bey* on the Philadelphia waterfront.

On the record as presently constituted, petitioner has failed to establish that typesetters work for every publisher and that publishers as a group should be considered as the employer in applying § 302(c)(5). Since the proposed payments would confer benefits upon union employees not "employees of such employer", the § 302(c)(5) exception would not apply to the award and its implementation would violate § 302(a). Accordingly, the arbitrator's petition must be denied.

This is not to say, however, that additional evidence might not show otherwise. Accordingly, the denial of the petition is without prejudice to its reinstitution within 21 days of the filing of this memorandum, at which time the interested parties would be allowed to introduce further evidence showing that employment practices in the New York newspaper publishing industry more closely approximate those found on, for example, the Philadelphia waterfront. If, after 21 days, counsel have not informed chambers of the undersigned of their intent toproduce additional evidence, the tentative denial of the petition will become final, and this court will sign and enter any appropriate order to such effect which may be submitted. It is so ordered.

Dated: June 26, 1972

SUPREME COURT, U. S.
FILED
SEP 24 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-280

THOMAS G. S. CHRISTENSEN, NEW YORK TYPOGRAPHICAL UNION NO. 6, ET AL., *Petitioners,*

v.

NEW YORK TIMES COMPANY, ET AL., *Respondents.*

BRIEF FOR RESPONDENT NEW YORK TIMES COMPANY IN OPPOSITION.

HARRY A. INMAN
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

JOHN J. STANTON, JR.
General Attorney
NEW YORK TIMES COMPANY
Counsel for Respondent
New York Times Company and
John Bogart, Employer Trustee
New York Times Company
229 West 43rd Street
New York, New York 10036

September 24, 1973

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IN THE

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OCTOBER TERM, 1973

No. 73-280

THOMAS G. S. CHRISTENSEN, NEW YORK TYPOGRAPHICAL UNION NO. 6, ET AL., *Petitioners,*

v.

NEW YORK TIMES COMPANY, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NEW YORK TIMES COMPANY IN OPPOSITION.

The petition herein seeks review of a decision by the United States Court of Appeals for the Second Circuit entered May 15, 1973. The decision of the court of appeals affirmed the opinion and judgment of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, issued on May 15, 1973, is reported at 83 LRRM 2410. It is reprinted in the Appendix to the petition, p. 1a*, *et seq.*

* Citations with the suffix "a" are the pages of the Appendix to the petition.

The opinion of the United States District Court for the Southern District of New York (Tyler, J.), rendered on June 26, 1972, is reported at 344 F.Supp. 194. It is reprinted in the Appendix to the petition, p. 7a, *et seq.*

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether under the provisions of Section 302(c)(5) of the Labor Management Relations Act, the trustees of a jointly administered trust fund may lawfully pay benefits to persons who, though employed in the New York newspaper industry, are not and have not been employes of employers contributing to the jointly administered trust fund.

Statutory Provisions Involved

The pertinent provisions of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 are set forth in the petition at page 3.

Section 186 of the Labor Management Relations Act of 1947 is reprinted in its entirety in the respondent's Appendix hereto, p. 1a, *infra.*

Statement of The Case

In the decade of the 1960's, the newspaper publishers in New York City including The New York Times and the Post negotiated agreements with the union which authorized them to set in type stock market tables through the use of tape (known as Outside Tape) received from the Associated Press or United Press International (App. 77a).* The use

* Citation to "App." followed by page number are to the Joint Appendix in the court of appeals which has been furnished to this Court.

of such tape eliminates the need to have employes in the composing room of a publisher set the stock market tables by hand or by machine. It was further negotiated that a publisher using such Outside Tape would make payments equal to the wage value of the number of hours of composing room work saved through the use of Outside Tape (App. 80a).

Not all publishers adopted Outside Tape. Among the publishers who have not adopted Outside Tape are the New York News, Inc. and other smaller publishers under contract to the union (App. 55a-56a, 77a).

A Taft-Hartley Act Trust, pursuant to Section 302(c) of that law (technically the Labor Management Relations Act of 1947), was established. Initially there were separate trusts for each employer utilizing outside tape and contributing to the Fund (App. 55a-56a). These separate trusts were later merged into a single trust known as the Outside Tape Fund to which contributions were made only by publishers using Outside Tape (App. 56a).

In 1971 the union-trustees proposed a plan under which supplemental unemployment benefits would be payable to any employe of a newspaper publisher having a contract with the union whether or not the employer had ever contributed to the Outside Tape Fund (App. 21a, 58a). Under such proposal, the employes of publishers not using Outside Tape and not contributing to the Outside Tape Fund, such as the employes of the New York News, Inc. and other smaller publishers, would be eligible to receive the benefits.

The employer-trustees contended that the proposal of the union-trustees to be lawful must limit the payment of the proposed benefits to employes of contributing employers (App. 59a).

The dispute was submitted to arbitration before Arbitrator Thomas G. S. Christensen, one of the petitioners herein.

He was directed to determine whether the collective bargaining agreements and the trust agreement authorized the adoption of the union trustees' proposal under which benefits would be paid to employes of non-contributing employers. (App. 23a, 25a). The arbitrator found that the union trustees' proposal would comply with the collective bargaining agreements and the trust agreement.

The Arbitrator then proceeded as directed by the arbitration agreement to petition the United States District Court for the Southern District of New York for a declaratory judgment as to the legality of such a benefit plan under Section 302 of the Labor Management Relations Act.

The District Court denied the petition, holding that under Section 302 it was not lawful for the trust in question to utilize trust funds to benefit employes who are not and never have been employes of contributing employers. The Second Circuit affirmed with Judge Wyzanski dissenting.

Argument

1. The decision below was correctly decided.

Respondent submits that both contentions urged by the petitioners as meriting review by this Court on certiorari are grounded fundamentally on the petitioner's disagreement with the failure of the court below to accept or adopt the factual contentions urged by the petitioner.

Petitioners' consistently throughout these proceedings have urged that the employer-employe relationship between typographical employes employed in the individual composing rooms of The Times and the Post should be ignored or disregarded, and urge that these employes are really employed by the newspaper industry of New York. Petitioners then argue that when the typographical employes at The Times and the Post are viewed as employed by the

newspaper industry, the instant situation becomes analogous or equatable to a "shape-up" employment situation on the Philadelphia waterfront and should have been decided in accordance with *Bey* v. *Muldoon*, 223 F.Supp. 489 (E.D.Pa., 1963), aff'd, 354 F.2d 1005 (3rd Cir. 1966), cert. denied, 384 U.S. 987 (1966).

The opinion of the court below specifically affirmed that there was a real and distinct factual differentiation extant between the employment situation of typographical workers employed by the Times and the Post in New York City and the employment situation of stevedores employed on the Philadelphia waterfront. The court below affirmed the factual findings of Judge Tyler that the employment situation of typographical workers at the Times and the Post was not the employment situation of a shape-up on the Philadelphia waterfront. It affirmed that the typographical workers are employed by newspaper publishers on a full-time permanent basis in contrast to the "peripatetic" nature of waterfront employment.

The court below specifically dismissed petitioners' contention that the issue be determined by the *Bey* case, pointing out:

> "It suffices to point out that the result in *Bey* rested on the peculiar nature of the use of longshoremen on the Philadelphia waterfront; the longshoremen worked for the "waterfront" rather than for any particular stevedoring company. It is apparent from the record developed here that, unlike the Philadelphia longshoremen, the vast majority of typographical workers at The Times and the Post are employees of one newspaper employer. Thus *Bey* is not persuasive authority for the contention of appellants." (83 LRRM at 2411; (4a)).

Clearly, the underlying contention urged by the petitioners' presents only a disagreement with the factual analysis and findings in the proceedings below and in no way warrants review on certiorari by this Court.

2. The decision below does not reflect a conflict between the Second and Third Circuits as to the application and interpretation of § 302(c)(5).

The petitioners' have principally relied throughout these proceedings and urge before this Court the failure of the court below and of the district court to adopt as applicable to the respondent the peculiar and unique factual situation present in *Bey* v. *Muldoon, supra.* The principal opinion in that case is that of Judge Lord in the District Court proceedings wherein he found in the peculiar facts of that employment situation that the "waterfront was the employer." The Third Circuit's brief affirming *per curiam* opinion in that case cannot be urged as conflicting with the opinion of the court below in view of the fact that the *Bey* opinion addressed only the unique and peculiar factual findings present in the record.

In the District Court decision in the instant case, Judge Tyler specifically found that:

> "On the record as presently constituted, petitioner has failed to establish that typesetters work for every publisher and that publishers as a group should be considered as the employer in applying § 302(c)(5)." 344 F.Supp. at 198.

Indeed in the instant case Judge Tyler prior to issuance of his decision specifically extended to all interested parties a period of 21 days to introduce any further evidence on the factual question that employment practices in the New York

newspaper industry more closely approximate those found on the Philadelphia waterfront. No interested party availed itself of such an opportunity. (App. 105a).

Respondent further submits that, contrary to petitioners' urging, the decision of the court below reflects a consistent continuum of judicial interpretation of Section 302(c)(5) on the issue at hand. *Moglia* v. *Geoghegan*, 403 F.2d 110, 113 (2nd Cir. 1968), cert. denied, 354 U.S. 919 (1969); *Blassie* v. *Kroger Company*, 345 F.2d 58, 71 (8th Cir. 1965); *Operative Plasterers' Cement Mason International Association* v. *Paramount Plastering Inc.*, 310 F.2d 179, 191, 186 (9th Cir. 1962), cert. denied, 372 U.S. 144 (1963).

Clearly, the lawfulness of the benefit payments here in question must be first examined in terms of the existing employer-employe relationship—that is, the benefiting employe must have an employer, who lawfully contributed. The court below properly affirmed that The Times and the Post were the respective employers of their own typographical workers. On such finding, the court, it is submitted, properly and consistently found that Section 302(c)(5) prohibited trust fund payments to the employes of either a non-contributing employer, or the employes of an employer who had never contributed.

3. The decision of the court below does not raise important questions of statutory construction.

Petitioners' urge that the court interpreted § 302(c)(5) in its most literal sense and in disregard of its legislative history and the evils that Congress sought to outlaw. It is submitted that again petitioners' contention is but a cloak for its disagreement with the affirmance by the court below of the factual findings that there is a difference and a dis-

tinction between typographical workers employed by The Times and the Post and stevedores on a "shape-up" at the Philadelphia waterfront for whom the "waterfront" is the employer. It is submitted that the court below, at most, applied the language of the statute to the factual situation established by the record. The factual situation clearly established that there was an employer-employe relationship between The Times and the Post and their typographical employes. What the petitioner sought in the courts below was an amendment of the statute rather than an interpretation. The court below properly declined to amend the statute to allow trust funds to expend moneys even for laudable purposes when not within the purview of the statute. It is submitted that the decision of the court below should in no sense be misconstrued as a strict or overly literal interpretation of Section 302(c)(5) but rather as in accord and consistent with decided judicial precedent that it is for the Congress to enact further exemptions in Section 302(c)(5).*

In *Operative Plasterers' and Cement Mason International Association* v. *Paramount Plastering Inc.*, 301 F.2d 179 (9th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963), the Court in a detailed analysis of the scope and purpose of Section 302

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* That the prerogative of deciding and determining those specific purposes and beneficiaries to which joint Trust Fund moneys may be expended is vested solely in the Congress is shown by the history of legislative amendment to Section 302(c). Thus it was necessary to obtain specific legislative amendment to Section 302(c) to permit trust funds to be established for the obviously laudable purposes of providing vacation, holiday, severance or similar benefits or defraying costs of apprenticeship or other training programs (subdivision 6 added to Section 302(c) by Section 505 of the Labor Management Reporting and Disclosure Act of 1959 enacted September 14, 1959) and educational scholarships and day care centers (Subdivision 7 added to Section 302(c) by Public Law 86, 91st Congress, 83 Stat. 133 enacted October 14, 1969).

affirmed a lower court judgment that an Industry Program, Institute Trust and Labor-Management Relations Trust were not within the exemptions created by Congress and not permissible objects for the use of joint trust funds. In conclusion, the Court said:

> "We do not quarrel in the slightest with the laudable objectives of the trust amicably created by labor and management in this case. We sympathize with the efforts of both labor and management to solve a vexing industry problem. But like so many of such present day problems, our duty is to rule in accordance with that which the Congress (quote) in its wisdom (end of quote) has seen fit to enact. We cannot widen the door when the door sill has been carefully tailored by the representatives in Congress." (310 F.2d at 191).

In *Blassie* v. *Kroger Co.*, 345 F.2d 58 (8th Cir. 1965), the Court was presented with a variety of Section 302 questions. One of these questions involved the lawfulness under Section 302 of payments by a jointly administered trust fund to retired employes whose employers had never contributed to the fund. In finding such a disposition of trust funds unlawful, even under a policy of construction favoring inclusion of benefits, absent positive statutory language to the contrary, the Court was constrained to find that:

> "... the statute does not, and the trust agreement therefore cannot permit the extension of benefits to persons who have never been in the active employ of a contributing employer or to those who, although having been in active employment, were not covered by employer contributions." (345 F.2d at 71).

Thus, it is submitted that the interpretation of the Section 302(c)(5) by the court below was in accord with de-

cided judicial precedent that trust moneys may not be paid to and enjoyed by employes of an employer who has never made a contribution on their behalf. Accordingly, the decision below did not raise questions of statutory construction which would warrant review by this court on certiorari.

Conclusion

For the reason stated the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

HARRY A. INMAN
1200 Seventeenth Street, N.W.
Washington, D. C. 20036

JOHN J. STANTON, JR.
General Attorney
NEW YORK TIMES COMPANY
Counsel for Respondent
New York Times Company and
John Bogart, Employer Trustee
New York Times Company
229 West 43rd Street
New York, New York 10036

Appendix

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

* * * * * * *

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

....

(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees

and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of em-

ployees: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.